No. 07-107

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.,
Petitioners,

v.

TIMOTHY M. COHANE.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

Sean O'Leary
O'LEARY & O'LEARY
320 Old Country Road
Suite 104
Garden City, NY 11530

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

October 12, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Should this Court grant review of the unpublished summary order in which the Second Circuit concluded that the district court erred in holding that the National Collegiate Athletic Association was categorically exempt from liability under 42 U.S.C. § 1983 and remanded respondent's case to the district court for further proceedings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

Petitioners NCAA et al. (collectively, "NCAA") seek review of a non-precedential, summary order that does nothing more than state that the NCAA's status as a private association does not render it categorically exempt from liability under 42 U.S.C. § 1983 and on that basis remands the case to the district court for further proceedings.

1. As this case arrives on petitioners' motion to dismiss, the relevant facts are taken from respondent's complaint and assumed to be true. *See Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). According to the complaint, from 1993 to 1999, respondent Timothy M. Cohane served as the head basketball coach of the State University of New York at Buffalo ("SUNY" or "SUNY Buffalo"). Pet. App. 24a. In January 1999, SUNY Buffalo – recognizing respondent's extraordinary performance as a coach – extended his contract for an additional three years, through April 13, 2002. *Id.* 28a. Previously, respondent spent over two decades coaching basketball, including fourteen years as a college coach. *Id.* 27a. Throughout that time, respondent was never accused of committing even minor violations of NCAA rules. Resp. C.A. Br. 5.[1]

Petitioner National Collegiate Athletic Association ("NCAA") is an unincorporated association that markets, rules, governs, controls, operates, and licenses the college sports industry. Pet. App. 24a-25a. In particular, at all times relevant to respondent's complaint, the NCAA regulated the sports program and athletic department at SUNY Buffalo. *Id.* 25a.

In August 1999, respondent was accused of violating NCAA rules through his presence in the basketball gym during

---

[1] Respondent is a 1967 graduate of the United States Naval Academy. Pet. App. 26a. During 1968 and 1969, he served as a river boat commander in Vietnam. For his service, he was awarded a Purple Heart and two Bronze Stars. *Id.* 26a-27a.

the off-season – a so-called "secondary violation." *See* Pet. App. 28a; Resp. C.A. Br. 5.

On December 3, 1999, respondent was summoned to a meeting with SUNY Buffalo lawyers. Pet. App. 28a. At the meeting, respondent learned that the NCAA had advised SUNY Buffalo that it presumed respondent guilty of major NCAA rule violations and that SUNY should thus force him to resign. *Id.* Acting on the NCAA's recommendation, SUNY officials forced respondent to resign immediately, without any opportunity for a hearing. *Id.*

After respondent's resignation, the NCAA and SUNY officials continued to act jointly against his interests and contrary to NCAA bylaws. For example, officials from both the NCAA and SUNY Buffalo participated in presenting the case against respondent at a January 2000 hearing of the Mid American Conference, a subdivision of twelve NCAA teams in which SUNY Buffalo competes. Pet. App. 29a. At this hearing, respondent's due process rights were violated by "willful[,] arbitrary and capricious actions including the suborning of perjury." *Id.*

The NCAA also proceeded with its own investigation in concert with SUNY officials. In the spring of 2000, members of the NCAA's enforcement staff sought to interview SUNY Buffalo students whose eligibility to play collegiate sports had expired.[2] Pet. App. 30a. When some of the students initially refused to meet with the NCAA enforcement staff, SUNY officials threatened to withhold the students' degrees unless they complied with the NCAA investigators. *Id.*

---

[2] Under NCAA bylaws, the NCAA can strip a student athlete of his eligibility to compete if he "[r]efus[es] to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual's institution." *See* Article 10, 2000-2001 NCAA Division 1 Manual, http://www.ncaa.org/library /membership/ division_i_manual/2000-01/article_10.pdf. However, once a student athlete's eligibility has expired, the NCAA would generally have little recourse to compel him to cooperate if he does not wish to do so.

Two members of the NCAA's enforcement staff, petitioners Hosty and Hanna, were fully aware that the university had provided the NCAA with testimony that was coerced, false, and otherwise tainted. Hosty and Hanna also changed testimony to support their case against respondent. Pet. App. 30a. Hosty and Hanna then used this tainted evidence to compile a case summary of the investigation, issued on January 29, 2001, to be used by the NCAA Committee on Infractions at a hearing regarding the investigation into the alleged violations. *Id.*

On February 9, 2001, respondent appeared at the hearing conducted by the Committee on Infractions. Both NCAA and SUNY officials participated in the hearing and jointly and knowingly presented the tainted and false evidence against respondent. Pet. App. 30a.

Based on the tainted evidence gathered by NCAA and SUNY employees and presented at the February hearing, on March 21, 2001, the NCAA published a final report – made available on the Internet – in which it condemned respondent's alleged conduct and his character. Pet. App. 30a-31a. Specifically, the final report deemed respondent to have been "evasive, deceptive and not credible," and it charged him with "violating principles of ethical conduct." *Id.* 31a. And contrary to prior cases in which similar conduct had been deemed a minor violation of NCAA rules, the report – in retaliation for respondent's efforts to defend himself – concluded that respondent was guilty of "major violations." *Id.* The NCAA also imposed sanctions that, when combined with the March 21, 2001, report, would effectively render it impossible for respondent to obtain a coaching position at another NCAA school. *Id.*

In conjunction with the release of the final report, NCAA and SUNY Buffalo officials held a joint press conference at which SUNY officials publicly declared that they "accept[ed] the report and its findings in its entirety." Pet. App. 31a.

Respondent appealed the report and its findings to the NCAA Appeals Committee, which agreed with respondent that "many aspects of the case were troublesome." Pet. App. 31a-32a. In particular, the Appeals Committee emphasized, an "assertion of innocence[,] however vigorous[,] against charges of violations should not ordinarily be the subject of an unethical conduct finding." *Id.* 32a. And although the Appeals Committee acknowledged that the investigation and subsequent report remain a "stain on [respondent's] reputation and career," neither the NCAA nor SUNY Buffalo removed the ethical conduct violation from its records. *Id.* The ethical conduct violation remains on respondent's employment and NCAA records, amounting to "a scarlet letter" that makes him unemployable as a college basketball coach. *Id.*

2. On March 19, 2004, respondent filed this suit, alleging that the NCAA's direct actions in joint participation with SUNY Buffalo deprived him of his liberty interest in his reputation without due process of law, in violation of 42 U.S.C. § 1983. *See* Pet. App. 10a. Section 1983 provides a private right of action for deprivations of constitutional rights by persons acting "under color of" state law. It is well-settled that the statute's provisions extend to private actors when their actions are "fairly attributable" to the state. As this Court has repeatedly made clear, whether an action is "fairly attributable" to the state depends on a host of fact-specific criteria. One such criterion is "when a private actor operates as a willful participant in joint activity with the State or its agents." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (internal quotation marks omitted) [hereinafter *Brentwood I*].

Petitioners filed a motion to dismiss respondent's complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the basis of this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988). In *Tarkanian*, this Court considered whether the NCAA could be held liable under § 1983 in former UNLV basketball coach Jerry Tarkanian's challenge to his suspension by a state

university. Tarkanian alleged that because the state university, in suspending him, had acted in compliance with NCAA rules and recommendations, the NCAA's conduct constituted "state action" for purposes of the statute. Based on the specific facts before it, the Court rejected Tarkanian's contention that the NCAA could be deemed a state actor under the joint participation theory. *Id.* at 196 n.16. In particular, the Court explained, Tarkanian's assertion was "belied by the history of the case," which indicated not only that the NCAA and UNLV had not cooperated in the investigation of Tarkanian, but indeed that the interests of the NCAA and UNLV were so "diametrically opposed" that the two actually acted as adverse parties. *Id.* at 196. And even to the extent that UNLV and the NCAA might have acted cooperatively, the Court found "no suggestion of any impropriety." *Id.* at 197 n.17.

Respondent's complaint differs materially from Tarkanian's allegations that UNLV's compliance with NCAA rules and regulations rendered the NCAA a state actor. Respondent alleges that the NCAA and SUNY Buffalo officials willfully participated in joint activity that culminated in the NCAA's release, and the university's ratification, of the March 21, 2001 report of its investigation. Pet. App. 28a-32a. The complaint provides detailed examples of such joint activity, including that SUNY Buffalo officials – at the NCAA's behest – coerced students into interviewing with NCAA officials by threatening to withhold their college degrees, *id.* 30a; NCAA enforcement officials knowingly prepared a case summary that relied on tainted evidence provided by university officials, *id.*; NCAA and SUNY Buffalo officials knowingly used tainted evidence when they jointly presented the case against respondent at the February 2001 hearing, *id.*; the NCAA issued the report condemning respondent's conduct entitled "University at Buffalo, The State University of New York Public Infractions Report," *id.* 30-31a; and both the NCAA and SUNY Buffalo officials appeared at a joint press conference regarding the report. *Id.* 31a. In light of

these allegations, the complaint concludes, the NCAA's conduct constituted state action such that the organization may be held liable for its role in unconstitutionally defaming respondent and precluding him from pursuing his career as a basketball coach. *Id.* 32a-34a.

Despite these many distinctions, petitioners argued to the district court that *Tarkanian* adopted a *categorical* rule that the NCAA is *never* a state actor. Pet. App. 12a. The court agreed. *Id.* 15a-18a. Opining that "the Supreme Court has explicitly held that the NCAA is not a state actor within the meaning of Section 1983," *id.* 15a, the district court held that "*Tarkanian* compels the same conclusion" in respondent's case, *id.* 16a.

3. On appeal, a panel of the Second Circuit rejected the district court's categorical holding in a non-precedential, summary order that remanded the case for further proceedings. Pet. App. 1a-5a. The court of appeals explained that this Court held in *Tarkanian*, based on the particular facts of that case, that the plaintiff could not sue the NCAA under § 1983 for the actions involved in that case. *Id.* 4a. Accordingly, "it was error for the District Court to interpret *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school." *Id.* 5a. Petitioner moreover was entitled to pursue his state action allegations because of the many differences between the facts of *Tarkanian* and the allegations of respondent's complaint. *Id.* 4a-5a. In particular, while the NCAA and UNLV had acted as adversaries in *Tarkanian*, respondent's complaint "describe[d] a pattern of collusion between the University and the NCAA." *Id.* 4a. And unlike Tarkanian, who had not suggested any impropriety in the agreement between the NCAA and UNLV, here respondent had specifically alleged joint activity in the intimidation of student-witnesses and the suborning of false testimony. *Id.* 4a-5a. Taking care to note that "the NCAA may be able to rebut [respondent's] claims and show that it did not engage in concerted action with the University," the court of appeals remanded because these "non-conclusory allegations

combined with others in the complaint, if proven, could show that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty." *Id.* 5a.

REASONS FOR DENYING THE WRIT

This case presents an unremarkable application of this Court's state action jurisprudence in which the Second Circuit's summary order holds only that the NCAA is not categorically immune from § 1983 liability and remands for factual development of a plaintiff's claims. Because this interlocutory order is correct on the law, creates no circuit split, and establishes no controlling precedent, this Court's review would amount to nothing more than fact-bound error correction.

For purposes of 42 U.S.C. § 1983, this Court has consistently held that a private actor may face liability if its conduct is fairly attributable to the state and that one of the "host of facts . . . [that] can bear on the fairness of . . . [such] an attribution" is whether a "private actor operates as a 'willful participant in joint activity with the State or its agents.'" *Brentwood I*, 531 U.S. at 296. The Second Circuit, distinguishing this Court's decision in *Tarkanian*, held that the NCAA *could* face § 1983 liability given the non-conclusory factual allegations in respondent's complaint. Such a holding falls squarely within this Court's state action jurisprudence.

I. The Procedural Posture of the Case and the Limited Nature of the Second Circuit's Decision Make It Inappropriate for Review.

The Second Circuit's order rested on a particular, narrow ground: based on its conclusion that the district court had erroneously deemed petitioner NCAA categorically exempt from liability as a state actor, the court of appeals remanded the case to the district court for proceedings to continue. Respondent will have the opportunity for discovery to prove his allegations, and petitioners will have ample opportunity to rebut those allegations. Once some initial discovery has occurred, moreover, petitioners are free to file a motion for

summary judgment. The district court can then "sift[]" and "weigh[]" the facts and circumstances in light of this Court's state action precedents. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). If petitioners disagree with the district court's ultimate disposition, they are free to seek review in the Second Circuit and, if appropriate, this Court.[3]

The petition dramatically asserts that if certiorari is denied, the order below will open the floodgates of litigation against petitioner NCAA in connection with its frequent investigations and enforcement of sanctions at state universities. Pet. 30. This is simply untrue. In most cases, potential plaintiffs will be unable, consistent with the NCAA's practices, the behavior of their employers, and the pleading rules, to make the kind of non-conclusory allegations that can survive a motion to dismiss. The NCAA's claim is also belied by the narrowness of the court of appeals' ruling – that the NCAA merely is not per se exempt from liability under § 1983 – and respondent's unique allegations – namely, that the NCAA and SUNY Buffalo had engaged in concerted action, including myriad improprieties, to deprive him of his constitutional rights. The Second Circuit certainly did not hold that the NCAA's investigative and enforcement activities, standing alone, would constitute joint action and subject it to liability; nor does the NCAA have any justification to claim that such a result would follow in the mine run of cases. As this Court explained in an analogous context, even after a lower court had held that the Tennessee Secondary School Athletic Association was a state actor for purposes of that case, there was absolutely no evidence of a "litigation explosion." *See Brentwood I*, 531 U.S at 289. And even if petitioners'

---

[3] Moreover, because on remand the case could still come out in the NCAA's favor – either because it could show that it was not a state actor or because it ultimately prevails on the merits of respondent's § 1983 claim – the NCAA has not made a compelling showing that this Court should take the extraordinary step of granting review to correct the alleged error in this case.

predictions of a torrent of litigation were to come to pass, this Court would then have ample opportunities to close the floodgate in a case involving a precedential lower-court opinion and a fully developed record.

Indeed, this Court recently denied certiorari in *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir.), *cert. denied*, 76 U.S.L.W. 3058 (2007), which sought review of the Eighth Circuit's holding that a private non-profit corporation was a state actor because it had engaged in joint activity with the city. That case would have offered a better vehicle to consider the state action question: it was on appeal from a final judgment that provided the court of appeals with a fully developed record on which to base its thorough state action analysis. To the extent that the Court might want to consider the joint participation question, the proximity of these two cases demonstrates that other, better vehicles will later present themselves.

II. The Allegations Involved in This Case Bring It Squarely Within This Court's State Action Jurisprudence.

1. In contrast to petitioners' caricature, the order below – viz., rejecting the NCAA's argument that it is categorically exempt from liability as a state actor under § 1983 – is entirely consistent with this Court's precedents. The district court's holding, echoed by the NCAA, that it can never be regarded as a state actor is insupportable.

Section 1983 grants a private right of action to individuals whose constitutional rights have been violated by a party acting under color of state law. Because the NCAA does not dispute that respondent has adequately alleged a violation of his Fourteenth Amendment due process rights, this case presents only the question whether the NCAA acted under color of state law.

When, as here, a party claims that he has been deprived of his rights under the Fourteenth Amendment, § 1983's under-color-of-state-law requirement turns on whether the alleged

violator can be characterized as a "state actor" for purposes of the Fourteenth Amendment. *See Tarkanian*, 488 U.S. at 182 n.4. As this Court has explained, a private party can be deemed a state actor if "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood I*, 531 U.S. at 295 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)) (internal quotation marks omitted).

This Court has refused to rely solely on the *identity* of the actor to determine whether state action exists, and has instead repeatedly held that the inquiry into whether a private party is a state actor is highly fact-specific. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999). On that basis, this Court has rejected precisely the kind of bright-line rule that petitioners seek to impose. In *West v. Atkins*, for example, this Court held that the Fourth Circuit had "misread [the decision in] *Polk County* [*v. Dodson*, 454 U.S. 312 (1981),] as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities." 487 U.S. 42, 51 (1988). Thus, although *Polk County* held that public defenders do not act under color of law for § 1983 purposes with respect to their representation of their clients, the Court has held them amenable to suit under § 1983 when they make personnel decisions, *Branti v. Finkel*, 445 U.S. 507 (1980), and when they conspire with state officials to deprive their clients of federal constitutional rights, *Tower v. Glover*, 467 U.S. 914 (1984).

The state action determination instead rests on the analysis of the facts surrounding the challenged *conduct* of the private party. Whether a "private actor operates as a willful participant in joint activity with the State or its agents" is one of "a host of facts that can bear on the fairness of . . . an attribution" of a private party's "seemingly private behavior" to the state. *Brentwood I*, 531 U.S. at 296 (internal quotation marks omitted). The "joint participation" theory has its origins in *Burton*, in which the Court held that a private restaurant

which leased space in a public building could be held liable for racial discrimination under § 1983 in light of the symbiotic relationship between the state and the restaurant. 365 U.S. 715 (1961). Reasoning that the state agency's financial success depended on the profits from the restaurant, the Court concluded that the restaurant was a state actor because the "State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity." *Id.* at 725.

Other such factors bearing on whether private conduct can be attributed to the state include, for example, when the state exercises "coercive power," "when the state provides significant encouragement, either overt or covert," when a private entity "is controlled by an agency of the State," "when it has been delegated a public function by the State," "when it is entwined with governmental policies, or when government is entwined in [its] management or control." *Brentwood I*, 531 U.S. at 296 (internal citations and quotation marks omitted).

In short, "[f]rom the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient." *Brentwood I*, 531 U.S. at 295. Even under petitioners' limited conception of the "joint participation" theory, the relevant inquiry in a case such as respondent's is, at bottom, whether there is a sufficiently close nexus between the state and the challenged action to treat the seemingly private behavior as action of the state itself. *Id.*

2. Given the non-conclusory allegations of joint activity set forth in respondent's complaint, the court of appeals was correct to remand this case. Respondent alleges that the NCAA acted jointly with SUNY Buffalo to willfully violate his due process rights via a pattern of cooperation riddled with improprieties. In a letter to the NCAA on August 3, 1999, a MAC employee first raised the issue of an alleged infraction of NCAA rules by respondent, referring to "documentation

offered by the school." Pet. App. 28a. In response, "the NCAA advised SUNY that it was assumed [respondent] was guilty of major NCAA rule violations and . . . should be forced to resign." *Id.* The university forced respondent's resignation as head men's basketball coach on December 3, 1999. *Id.*

After respondent resigned, the NCAA and SUNY Buffalo acted together against him to ensure that NCAA sanctions would preclude him from coaching at any other NCAA school. The NCAA and SUNY jointly gathered and presented coerced, falsified, and tainted evidence against respondent. In one instance, the NCAA requested interviews with students who had exhausted their NCAA eligibility and thus fell outside the NCAA's influence. *See* Pet. App. 30a. To force the students' compliance with the NCAA's wishes, SUNY officials "misled and improperly advised student-athletes that if they did not comply with the NCAA request for an interview the issuance of their degrees could be at risk." *Id.* In another instance, NCAA employees "used and relied upon information provided by SUNY Buffalo officials including affidavits the [NCAA officials] knew were coerced, false and otherwise tainted" and further "willfully and recklessly changed testimony in order to implicate [respondent]." *Id.* The NCAA and SUNY then together "knowingly and carelessly permitted" this jointly tainted evidence to be presented and used against respondent at the NCAA's February 9, 2001, hearing. *Id.*

These instances of improper cooperation culminated in the NCAA issuing a damning report entitled "University at Buffalo, The State University of New York Public Infractions Report," which SUNY accepted "in its entirety" at a joint press conference with the NCAA. *Id.* 31a. In the report, the NCAA imposed sanctions "to keep [respondent] from being able to coach in any NCAA school." *Id.* And, in "retaliation against [respondent]'s attempts to defend himself," the report found major violations for what "[i]n over 300 cases before and since . . . the NCAA uniformly ruled . . . minor violations." *Id.* Moreover, even though the NCAA Appeals Committee later

found many aspects of the case against respondent "troublesome" and reprimanded the NCAA Committee on Infractions for "not interviewing key witnesses; inconsistent investigation; using certain troublesome language involving the ethical conduct violation; [and] the rationale for the ethical finding," neither the NCAA nor SUNY revoked the report. *Id.* 32a. The report remains part of respondent's file and "continues to be disclosed by the [NCAA] and State University officials to all prospective future employers of [respondent]." *Id.* 31a-32a.

Improper cooperation in which the state and the private party share a joint mission contrasts greatly with circumstances in which the state merely approves of or acquiesces in the challenged private act.[4] Contrary to the petition's assertion, Pet. 13-14, however, respondent does not allege that state action arises merely from SUNY Buffalo's compliance with the NCAA's otherwise private investigatory and enforcement rules. Instead, respondent alleges improper concerted actions – which the Second Circuit characterized as a "pattern of collusion," Pet. App. 4a – between the NCAA and SUNY, which violated respondent's constitutional rights. Both the NCAA and SUNY took steps to coerce, taint, and manipulate evidence; both knowingly allowed such evidence to be used against respondent to further a common mission of establishing a case against him; and both jointly endorsed and disseminated

---

[4] In *Jackson v. Metropolitan Edison Co.*, for example, petitioner filed suit against her utility company alleging that it acted under color of law when, in a manner authorized under state law, it shut off her electricity. 419 U.S. 345, 347 (1974). The Court rejected this claim, holding that heavy and detailed state regulation, standing alone, did not transform the private utility's decision into state action. *Id.* at 358. Because the state did not participate in, request, or cooperate in the suspension of service, but merely permitted it, the utility's action could not be fairly attributable to the state. *Id.* at 355 n.15, 358; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (private insurer's decision to withhold payment for disputed medical treatment was not fairly attributable to the state because decision was merely made with state permission).

a report based on the tainted and false evidence. Because of these improper joint activities, the NCAA can be held liable under § 1983.

Respondent's allegations of improper cooperation between petitioners and SUNY support a § 1983 claim against the NCAA in light of this Court's state action jurisprudence. In *Adickes v. S.H. Kress & Co.*, a white woman brought a civil rights suit against a private restaurant for refusing her service when accompanied by her African-American students. 398 U.S. 144, 146 (1970). This Court reversed the lower court's grant of summary judgment to the defendant in light of evidence that the restaurant may have improperly cooperated with a police officer. *Id.* at 157. The Court found that the petitioner's unrebutted allegations of the presence in the restaurant of a police officer who later arrested the petitioner for vagrancy demonstrated a genuine issue of material fact that the restaurant acted as a willful participant in joint activity with the state. *Id.* at 157-58. "If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a [restaurant] employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Id.* at 158.

A similar corrupt agreement subjected private parties to suit under § 1983 in *Dennis v. Sparks*, 449 U.S. 24 (1980). In *Dennis*, respondents claimed that private individuals who bribed a judge to enter an illegal injunction deprived them of their property interests without due process of law. *Id.* at 28. The Court held that the private actors, by entering into a corrupt agreement with the judge, rather than "merely resorting to the courts and being on the winning side of a lawsuit," acted under color of law as willful participants in joint action with the state. *Id.* at 28-29. Similarly, here the NCAA did not act under color of law simply because SUNY Buffalo cooperated with the NCAA in its normal investigative and enforcement procedures, but instead because the NCAA and the university

took joint actions in light of a corrupt agreement to deprive respondent of his liberty interest in his reputation and to destroy his ability to pursue his chosen occupation without due process of law.

3. Petitioners argue that this case warrants certiorari because this Court has purportedly limited the joint participation theory to the facts of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *Burton*, 365 U.S. 715 (1961), and express allegations of conspiracy.[5] Pet. 10-13. But that argument rests on a few statements from this Court torn from their factual context.

Petitioners' position cannot be reconciled with this Court's precedents over the nearly five decades since its decision in *Burton*, during which time this Court has applied the joint participation theory in a variety of different contexts. In *Gilmore v. City of Montgomery*, for example, when African-American citizens of Montgomery sought to enjoin the municipality from permitting segregated school groups to use public recreational facilities, the Court remanded for a sifting of the facts and weighing of the circumstances to determine "whether [the city's] involvement makes the city 'a joint participant in the challenged activity.'" 417 U.S. 556, 573-74 (1974).

Similarly, several years after this Court's decision in *Lugar*, this Court disposed of Coach Tarkanian's joint participation claim – which arose in a context wholly different from *ex parte* attachments – not by relying on petitioners' cramped construction of the joint participation theory, but instead by undertaking a fact-specific analysis that ultimately did not find sufficient cooperation or coinciding interests to support a finding of joint action. *See Tarkanian*, 488 U.S. at

---

[5] Notably, petitioners' argument largely rests not on this Court's precedent, but on dissenting opinions. *See* Pet. 11 (citing *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 636 (1991) (O'Connor, J., dissenting); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting)).

197 n.16. And in *West*, this Court held that a private physician who treated an inmate could be held liable under § 1983 based on the "joint effort[s]" of, and "cooperative" relationship between, medical personnel and prison officials. 487 U.S. at 51; *see also Brentwood I*, 531 U.S. at 296 (listing a private party's "willful participa[tion] in joint action with the State," without qualification or limitation, as a factor pointing towards state action).

Nor does this Court's opinion in *Lugar* support petitioners' cramped construction of the joint participation theory. In *Lugar*, this Court considered a § 1983 claim, brought by a debtor against a corporate creditor, alleging that the prejudgment attachment of the debtor's property constituted "state action" that deprived him of his due process rights. 457 U.S. at 922. Emphasizing that the debtor had challenged the state prejudgment attachment statute as "procedurally defective," and in light of its prior precedents regarding "the applicability of due process standards to such procedures," the Court agreed with the debtor that the creditor's joint participation with the state rendered it a state actor. *Id.* at 941-42.

To be sure, the Court in *Lugar* did state its holding narrowly, but in so doing it by no means limited the application of the joint participation theory exclusively to cases involving prejudgment attachments. Instead, the Court explained that although in prejudgment attachment cases, "joint participation" did not "require[] something more than invoking the aid of state officials to take advantage of state-created attachment procedures," 457 U.S. at 942, in other contexts the "mere invocation of state legal procedures" would not necessarily suffice to show joint participation, *id.* at 939 n.21.[6]

---

[6] Similarly, although in *American Manufacturers* this Court indicated that *Lugar*'s relatively low bar for finding joint action was limited to cases in which a private party attempts "to seize the property [of another] by an *ex parte* application to a state official," 526 U.S. at 58, nothing in *American Manufacturers* rules out a possible finding of joint action in cases involving

4. Nor is there merit to petitioners' assertion that the summary order below conflicts with this Court's decision in *Tarkanian*. In that case, this Court's decision that the NCAA did not act under color of law relied heavily on three specific factual circumstances, each of which is absent from this case.

First, in rejecting Tarkanian's claims, this Court repeatedly emphasized that the relationship between the NCAA and UNLV did not involve any cooperation. The Court explicitly pointed to the adversarial relationship between the school and the NCAA: "In the case before us the state and private parties' relevant interests do not coincide . . . ; rather, they have clashed throughout the investigation, the attempt to discipline Tarkanian, and this litigation. UNLV and the NCAA were antagonists, not joint participants, and the NCAA may not be deemed a state actor on this ground." *Tarkanian*, 488 U.S. at 196-97 n.16; *see id.* at 196 ("During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth."). Indeed, the Court noted, UNLV had sought to protect its "winningest" coach and ultimately suspended him to avoid having additional sanctions imposed on the school itself. *Id.* at 195-98. By contrast, respondent's complaint alleges precisely the kind of cooperative relationship between the NCAA and SUNY Buffalo that was absent in *Tarkanian*. *See supra* at 5-6.

Second, the conduct at issue in *Tarkanian* – Coach Tarkanian's suspension from his coaching position – was

---

true collusion or improper cooperation between private actors and state officials.

Petitioners' contention (at Pet. 12) that this Court has carved out a narrow exception to the so-called *Lugar* rule for allegations of conspiracy falls short for two reasons: it relies on a chronological sleight of hand, as it suggests that *Adickes* and *Dennis* limited *Lugar*, when in fact they preceded it; and it fails to account for language in *Dennis* which establishes that a conspiracy is only one form of joint activity that can be attributed to the state, *see Dennis*, 449 U.S. at 28 (state action arises by being a "co-conspirator *or* a joint actor" with a state official (emphasis added)).

imposed directly by UNLV. 488 U.S. at 192. Because Tarkanian sought to hold the NCAA liable as a state actor for its role in the suspension, this Court explained that "[t]his case uniquely mirrors the traditional state-action case" in which "a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Id.* Because the NCAA could not directly suspend the coach, the Court focused on whether the adoption of the NCAA's rules by the state school turned the NCAA into a state actor. *Id.* at 194-95. In light of the fact that UNLV at all times retained the authority to withdraw from the NCAA and set its own standards, the Court concluded that it did not. *Id.*

Here, by contrast, respondent alleges that actions directly taken by the NCAA deprived him of his liberty interest in his reputation. This case *is* "the traditional state-action case" in which the relevant state action inquiry is "whether [SUNY] participated to a critical extent in the NCAA's activities." *See* 488 U.S. at 192-93. Respondent alleges that the NCAA itself knowingly relied on evidence, which SUNY and the NCAA jointly coerced and tainted, to conduct its hearing and issue the March 21, 2001 public report. Under this Court's precedent, the complaint alleges sufficient facts to show that SUNY jointly participated in the NCAA's actions. *See supra* at 11-15.

Third, this Court in *Tarkanian* emphasized that "there [was] no suggestion of any impropriety respecting the agreement between the NCAA and UNLV." 488 U.S. at 197 n.17. The Court explained that improper joint conduct by a private party and the state can support a finding of state action, especially when the state provides the private entity "with governmental powers to facilitate [the private party's actions]." *Id.* at 197-98. But in *Tarkanian*, the Court found no such facilitation; it thus specifically contrasted the lack of impropriety in *Tarkanian* with the facts of *Adickes* and *Dennis*, noting that the "conspirators in *Dennis* became state actors when they formed the corrupt bargain with the [state agent],

and remained so through completion of the conspiracy's objectives." *Id.* at 197 n.17.

Here, by contrast, respondent's complaint alleges ample facts in support of the claim that such improprieties tainted the relationship between the NCAA and SUNY. Respondent alleges that the university cooperated with the NCAA in suborning false testimony, Pet. App. 29a; that NCAA officials tampered with evidence and accepted evidence from SUNY officials that they "knew [was] . . . false," *id.* 30a; and that NCAA and SUNY Buffalo officials knowingly permitted this tainted and false evidence to be used against respondent, *id.* The NCAA then issued the March 21, 2001 report "carrying a badge of authority bestowed by" SUNY Buffalo, and both the NCAA and SUNY Buffalo subsequently held a joint press conference at which SUNY Buffalo accepted the report in its entirety. *Id.* 30a-31a.

These factual differences distinguish this case from *Tarkanian*. Respondent in no sense challenges the everyday NCAA investigations and enforcement of its rules and regulations as state action. Instead, he challenges only the improper joint actions of the NCAA and SUNY depriving him of due process.

Much of petitioners' reliance on *Tarkanian* amounts to the assertion that the NCAA, by its very nature, can never be deemed a state actor when it conducts an investigation. But such a categorical rule is not the law. *See supra* at 10-11. Rather, this Court's decision in *Tarkanian* rested on the facts of that case. *See Tarkanian*, 488 U.S. at 193 ("[T]he question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."). And indeed, even the NCAA itself declined to advance such a categorical rule in *Tarkanian*, in which it instead relied on the facts of that case to argue that it was not a state actor because of the lack of "a

close nexus between the state and the challenged activity."[7] Br. of Pet'rs 42, *Tarkanian*, 488 U.S. 179 (No. 87-1061); *see* Reply Br. of Pet'rs 8-9, *Tarkanian*, 488 U.S. 179 (No. 87-1061) (arguing that the challenged activity in *Tarkanian* "[was] the NCAA's imposition of sanctions, not UNLV's response to those sanctions," over which the NCAA had no power).

The NCAA cannot now transform its limited victory in *Tarkanian* into a blanket exemption from *all* liability under § 1983. State action has consistently been found under § 1983 based on improper agreements between private entities and the state to violate individuals' constitutional rights. The same holds when the NCAA and agents of the state jointly and willfully act to violate individuals' rights. To find otherwise would allow the NCAA to escape liability no matter how egregious its joint activities with the state.

5. After arguing that certiorari is warranted to "clarify the 'joint participation' test for state action," Pet. 6, petitioners nonetheless (and paradoxically) suggest that the joint participation theory is sufficiently well-defined that the Court "may also wish to consider summary reversal" in this case, *id.* 7. As the foregoing discussion makes clear, no "clarification" is necessary, as petitioners' narrow construction of the joint participation theory lacks any basis in this Court's precedents. Nor would summary reversal be appropriate, as this is not a case in which the lower court either overlooked or incorrectly applied the law. Instead, the Second Circuit discussed *Tarkanian* at length and ultimately remanded this case for further proceedings in light of the myriad distinctions that it found between *Tarkanian* and this case.

---

[7] *See* Pet. 13-14 (arguing that here, just as in *Tarkanian*, "the adversarial nature of the NCAA's investigation and enforcement activities precludes any inference of conspiracy from joint action"); Pet. C.A. Br. 15 (in *Tarkanian* "the Supreme Court ruled, as a matter of law, that . . . state action could not be attributed to the actions of [the NCAA]").

III. The Circuit Conflict Alleged by Petitioners Is Illusory.

As the Second Circuit's rules, case law, and the order below all make clear, the order of the court of appeals remanding the case to the district court for further proceedings lacks precedential value and is not binding within the Second Circuit itself, much less other circuits. *See* 2d Cir. R. § 32.1(b) (dispositions by summary order); *In re Am. Tobacco Co.*, 866 F.2d 552, 555 (2d Cir. 1989) (a non-precedential ruling does not commit the court). Thus, the order below simply could not create an actual conflict, much less one warranting this Court's review.

In any event, petitioners' effort to conjure up a split among the courts of appeals rests on snippets from a few cherry-picked cases. In fact, virtually *all* of the circuits have recognized that a private party may be held liable under the joint participation theory. No court of appeals would have affirmed the per se rule of the district court in this case.

Contrary to petitioners' assertions that the First, Third, and Fourth Circuits "have questioned the continuing vitality of the joint participation test" and that the Fifth and Sixth Circuits "have explicitly limited the holding of *Lugar* to the narrow context of prejudgment attachment," Pet. 15-16, four of these courts have allowed § 1983 cases against private parties to proceed under the joint participation theory outside the prejudgment attachment context,[8] while the fifth has – without

---

[8] **1st Cir.**: *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10-11 (1st Cir. 1998) (private psychiatrists who evaluated but failed to alleviate the risks associated with a mentally unstable police officer are subject to suit as "joint participants in the challenged activity"), *cert. denied*, 525 U.S. 1105 (1999). Contrary to petitioners' claims, Pet. 17, the First Circuit did not limit the scope of joint participation as a basis for state action liability in *Perkins v. Londonberry Basketball Club*, 196 F.3d 13, 20-21 (1st Cir. 1999) (finding no state action, but declining to determine whether or to what extent *Burton* remained good law because there was no "symbiotic relationship" of interdependence and joint participation in the case at hand). Instead, the First Circuit continues to apply the "nexus/joint action test" without limiting its applicability to the facts of *Lugar* or *Burton*. *See*

Estades-Negroni v. CPC Hosp. San Juan Capestrano, 412 F.3d 1, 6-7 (1st Cir. 2005).

3d Cir.: *Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998) (ex-husband's complaint contained sufficient allegations of joint action with state officials to support claim against ex-wife as a private party under § 1983), *cert. denied*, 527 U.S. 1035 (1999). Petitioners' reliance on *Crissman v. Dover Downs Entertainment Inc.*, Pet. 17, is misplaced as that case deals with the "symbiotic relationship" test, which the Third Circuit considered to be distinct from the joint action inquiry. 289 F.3d 231, 242 (3d Cir. 2002) (en banc) (quoting with approval *Brentwood I*'s discussion of "willful participa[tion] with the State or its agents" as a fact supporting state action, while observing that "[n]otably absent [in the *Brentwood I* discussion] is any reference to the 'symbiotic relationship test'"). Since its decision in *Crissman*, the Third Circuit has confirmed that private actors may be held liable under § 1983 based on the joint participation theory. *Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005) (one "factual category" supporting a finding of state action "involves [a private entity engaging in] an activity that is significantly encouraged by the state or in which the state acts as a joint participant" (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Lugar*) (emphasis omitted)); *see also Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 195-96 (3d Cir. 2005) (addressing applicability of joint participation theory without limiting theory to *ex parte* attachments), *cert. denied*, 126 S. Ct. 2325 (2006).

5th Cir.: *Auster Oil & Gas v. Stream*, 764 F.2d 381, 387 (5th Cir. 1985) (complaint alleged sufficient facts to find private landowner subject to suit under § 1983 as "a willful participant in joint action" with police officers hired for an illegal search), *cert. denied*, 488 U.S. 848 (1988). *Davis Oil Co. v. Mills*, 873 F.2d 774, 780-81 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989), cited by petitioners, Pet. 17, did not limit joint participation to the facts of *Lugar*, but rather applied *Lugar*'s "low threshold" for joint participation in a case involving an *ex parte* deprivation of property. The Fifth Circuit has continued to recognize the validity of the joint participation theory to determine whether action took place under color of law without limiting the theory to either prejudgment attachments or the facts of *Burton*. *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999).

6th Cir.: *Am. Postal Workers Union, Local 96 v. City of Memphis*, 361 F.3d 898, 905-06 (6th Cir. 2004) (allegations supported finding that private employer and security agency acted as willful participants in joint activity with police to violate constitutional rights). The Sixth Circuit

limiting the theory's applicability to cases involving prejudgment attachments – recognized that a private party may be held liable under the joint participation theory.[9] Similarly, of the remaining courts of appeals, five have permitted cases not involving prejudgment attachments to proceed under the joint participation theory,[10] and the final circuit has recognized

---

recognizes that joint participation can satisfy its test for state action, applying a civil conspiracy standard when there are "allegations of cooperation or concerted action" in which private individuals "willfully participate in joint action with state agents." *Id.* at 905 (citing *Dennis* and *United States v. Price*, 383 U.S. 787, 794 (1966)). The most recent Sixth Circuit case cited by petitioners acknowledges that this test is appropriate for cases involving "allegations of concerted action between state and private actors." *Revis v. Meldrum*, 489 F.3d 273, 290-91 (6th Cir. 2007). Because it describes in detail the concerted actions of the NCAA and SUNY Buffalo, respondent's complaint would satisfy this test.

[9] **4th Cir.**: *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir.) (noting that one factor supporting a finding of state action is when "the private actor operates as a 'willful participant in joint activity with the State or its agents'" (citing *Brentwood I*, 531 U.S. at 296)), *cert. denied*, 534 U.S. 952 (2001).

[10] **7th Cir.**: *Brokaw v. Mercer County*, 235 F.3d 1000, 1016 (7th Cir. 2000) (finding child's relatives subject to suit under § 1983 for joint action with police via a conspiracy to have child declared ward of the state and forcibly removed from his parents' home). Petitioners' reliance on the two categories of conduct outlined in *Proffitt v. Ridgway*, 279 F.3d 503, 507-08 (7th Cir. 2002), is misplaced. Pet. 22-23. In cases that postdate *Proffitt*, the Seventh Circuit has found that a private party may act under color of law for purposes of § 1983 if "the private individual was a willful participant in joint activity with the state or its agents." *See, e.g.*, *Thurman v. Vill. of Homewood*, 446 F.3d 682, 687 (7th Cir. 2006).

8th Cir.: *Wickersham v. City of Columbia*, 481 F.3d 591, 597-99 (8th Cir.) (private nonprofit corporation properly held liable under § 1983 for First Amendment violations at air show because corporation "acted jointly and intentionally with the police pursuant to a 'customary plan'"), *cert. denied*, 76 U.S.L.W. 3058 (2007).

9th Cir.: *Berger v. Hanlon*, 129 F.3d 505, 514-16 (9th Cir. 1997), *vacated*, 526 U.S. 808 (1999), *judgment reinstated by* 188 F.3d 1155 (9th Cir. 1999) (finding warranted search jointly planned by private media

– again, without limiting the application to prejudgment attachments – that a private party may be held liable when it operates as a "willful participant in joint activity with the State or its agents."[11]

The NCAA attempts to further perpetuate the illusion of a circuit split by positing that respondent "obviously could not have satisfied any of the Fourth Circuit's 'exclusive' tests for state action." Pet. 16 (citing *DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000)). However, it omits mention of subsequent opinions by that court explaining that, although in cases such as *DeBauche* it had "identified four circumstances under which the Supreme Court had held that a private party may be deemed a state actor for purposes of § 1983 liability," those circumstances are *not* in fact exclusive. *Mentavlos v. Anderson*, 249 F.3d 301, 313 (4th Cir.), *cert. denied*, 534 U.S. 952 (2001). Instead, as the court explained, the "ultimate inquiry" is whether "there [is] a sufficiently 'close nexus' between the challenged actions of [the private party] and the State . . . such that their actions 'may be fairly treated as that of the State itself.'" *Id.* at 314 (citing *Brentwood I*, 531 U.S. at 296).

---

companies and the U.S. Fish and Wildlife Service subjected the media companies to liability under § 1983 as a joint participant).

10th Cir.: *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999) (finding private detoxification facility could be liable under § 1983 as a willful participant in joint action if its concerted action with state officials led to unconstitutional seizures).

11th Cir.: *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277-79 (11th Cir. 2003) (finding a genuine issue of material fact that advertising company's billboard restrictions amounted to state action because of company's joint action with a state agency).

[11] **D.C. Cir.**: *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991) (recognizing that joint activity involving "overt and significant state participation in the challenged action" can subject a private party to § 1983 liability), *cert. denied*, 503 U.S. 967 (1992).

IV. There Is No Need to Clarify That Actions Fairly Attributable to the State Constitute Actions "Under Color of" State Law for Purposes of § 1983.

The NCAA argues in the alternative that, even if its actions are fairly attributable to the state, certiorari is nonetheless warranted to clarify that it did not act "under color of law." It posits that "an ill-considered generalization in this Court's opinion in *Lugar* [makes] it difficult for the lower courts to draw . . . sensible distinctions" between what constitutes "state action" and actions "under color of law." Pet. 18; *see id.* 21-22 (contending that "*Lugar* has confused lower courts" because it suggests "that if a private party's conduct is state action" then the private party "has acted 'under color of law' for purposes of § 1983"). However, because the NCAA did not raise this argument in either the district court or the court of appeals, it has waived the argument.

In any event, petitioners' novel argument is contrary to this Court's case law. This Court in *Lugar* squarely held that "[i]f the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." *Lugar*, 457 U.S. at 935. Indeed, *Lugar* adopted precisely the opposite premise from what petitioners would have this Court assume: *Lugar* explained that not all "conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action," *id.* at 935 n.18, because the "under color of" law requirement is *broader* than the state action doctrine. The language cited by petitioners is thus hardly an "ill-considered generalization." Pet. 18. To the contrary, this Court has repeatedly and unquestioningly followed it.[12] Moreover, in light of such clear

---

[12] *See, e.g.*, *Brentwood I*, 531 U.S. at 295 n.2 ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes."); *Am. Mfrs.*, 526 U.S. at 50 & n.8 ("Where, as here, deprivations of rights under the Fourteenth Amendment are alleged, these two

precedent, the circuit courts have unanimously followed this Court's lead.[13]

---

requirements [i.e., "the state-action requirement of the Fourteenth Amendment" and "the under-color-of-state-law element of § 1983"] converge."); *West v. Atkins*, 487 U.S. 42, 49 (1988) ("In *Lugar* . . . the Court made clear that if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.'").

[13] **1st Cir.**: "For Appellees to have acted under color of state law, their actions must be 'fairly attributable to the State.' In other words, it must be fair to characterize them as state actors." *Estades-Negroni*, 412 F.3d at 4 (citations omitted).

2nd Cir.: "If a defendant's conduct satisfies the state action requirement under the Fourteenth Amendment, then that conduct also constitutes action 'under color of' state law for purposes of § 1983." *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 229 (2d Cir. 2004).

3rd Cir.: "We consider actions 'under color of law' as the equivalent of 'state action' under the Fourteenth Amendment." *Leshko*, 423 F.3d at 339.

4th Cir.: "[I]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, it also constitutes action 'under color of state law' for the purposes of § 1983." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 n.1 (4th Cir.), *cert. denied*, 540 U.S. 822 (2003).

5th Cir.: "[A] section 1983 plaintiff, alleging the deprivation of Due Process under the Fourteenth Amendment, must also show that state action caused his injury. In such cases, the 'under color of law' and state action inquiries merge into one." *Priester v. Lowndes County*, 354 F.3d 414, 421 (5th Cir. 2004) (citation omitted).

6th Cir.: "[A] private entity can be held to constitutional standards [under §1983] when its actions so approximate state action that they may be fairly attributed to the state." *S.H.A.R.K. v. Metro Parks Serving Summit County*, --- F.3d -----, 2007 WL 2403663 (6th Cir. Aug. 24, 2007).

7th Cir.: "To state a § 1983 claim based on a Fourteenth Amendment violation . . . the challenged conduct must also constitute state action. These two requirements—color of law and state action—are functionally equivalent." *Tarpley v. Keistler*, 188 F.3d 788, 791 (7th Cir. 1999). *Proffitt*, on which petitioners rely, *see* Pet. 22, and discussed *supra* at note 10, does not discuss the relationship between the "under color of law" and state action requirements but instead addresses only the question of

The NCAA suggests that even if its actions are attributable to SUNY Buffalo so that SUNY Buffalo could fairly be held responsible for the challenged conduct, it does not follow that the NCAA acted under color of law. This argument rests, however, not on this Court's precedents, but instead on Justice Powell's *dissenting* opinion in *Lugar* and a hypothetical involving a state official who coerces a private employer to fire an employee of whose speech the state official disapproves.[14] Pet. 20. In such a scenario, the NCAA argues,

---

state action – specifically, what type of behavior "transforms [a private actor] into a state actor." 279 F.3d at 508.

8th Cir.: "If a party's conduct meets the requirements for state action, the same acts also qualify as actions taken 'under color of state law' for purposes of § 1983." *Wickersham*, 481 F.3d at 597.

9th Cir.: "Conduct that is actionable under the Fourteenth Amendment as State action is also action under color of State law supporting a suit under § 1983." *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir.), *cert. denied sub nom. Or. Arena Corp. v. Lee*, 536 U.S. 905 (2002).

10th Cir.: "[S]tate action necessarily constitutes action under color of state law." *Pino v. Higgs*, 75 F.3d 1461, 1464 (10th Cir. 1996) (noting that "under color of state law" requirement might be broader than state action).

11th Cir.: "We have noted that the concepts of action under color of state law and state action are coterminous." *Almand v. DeKalb County, Ga.*, 103 F.3d 1510, 1513 n.7 (11th Cir. 1997).

D.C. Cir.: "For the kind of conduct at issue here, the 'under color of state law' standard of § 1983 and the 'state action' requirement for a claim under the Constitution are synonymous." *LaRouche v. Fowler*, 152 F.3d 974, 988 n.18 (D.C. Cir. 1998).

[14] The NCAA attempts to bolster its argument that it cannot be deemed to have acted under color of law by citing language from this Court's decision in *Blum* "recogniz[ing] . . . that ordinary § 1983 cases against public officials are 'obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State.'" Pet. 19 (citing *Blum*, 457 U.S. at 1003)). This argument is undermined, however, by this Court's acknowledgement – at the end of the same paragraph – that cases involving private-party defendants nonetheless "shed light upon the analysis necessary to resolve" cases such as *Blum*, in which the defendants were

even if the state may fairly be blamed for the firing, the private employer has done only what it had a right to do in the absence of intervention by the state. *Id.* Even if petitioners' novel analysis were correct in an appropriate context, that hypothetical has nothing to do with the facts of this case, in which respondent does not allege that SUNY Buffalo coerced the NCAA into action.[15]

Effectively acknowledging that the overwhelming weight of authority is against it, petitioners invent (without any citation to the case law, and again for the first time in this case) a new test that it proposes as the "correct analysis in 'joint participation' settings." Pet. 22. But respondent would meet even the more stringent standard imposed by petitioners' proposed test. As respondent's complaint alleges in detail, petitioners *did* wield delegated state power, and *did* conspire with state officials to induce them to violate their official duties. *See supra* at 11-13. In any event, whether respondent can meet petitioners' "test" is irrelevant: this Court has never suggested that "joint participation" should be so limited with

---

state officials. *Blum*, 457 U.S. at 1004. In any event, nothing in this Court's opinion in *Blum* – which considered only whether, for purposes of a suit brought under the Fourteenth Amendment, the state could be held responsible for decisions by private nursing homes to transfer or discharge Medicaid patients – addressed the circumstances in which a private party acts under color of law for purposes of § 1983.

[15] As discussed above, *see supra* note 13, there is no conflict among the circuits with regard to whether the "state action" and "under color of law" inquiries are the same in a case brought under § 1983. The decisions of the Ninth and Third Circuits that petitioners describe as "embrac[ing] the insight that if state action is found on the ground that government officials coerced the private conduct, that should support an action against the state but not against the private party" are not to the contrary. Pet. 23. Instead, those cases merely address whether government compulsion, unaccompanied by allegations of joint willful activity, can transform a private party into a state actor. Even to the extent that those cases might conflict with other cases presenting similar scenarios, such a conflict is irrelevant to this case, which does not involve any allegations of government compulsion or coercion.

regard to § 1983's "under color of" state law requirement and has no occasion to do so now.

V. There Is No Need for This Court to Vacate and Remand the Decision Below in Light of *Bell Atlantic v. Twombly*.

Disregarding the Second Circuit's express finding that respondent's complaint stated "non-conclusory allegations," Pet. App. 5a, petitioners argue in the alternative that this Court should grant certiorari, vacate the decision below, and remand this case to the Second Circuit for further consideration in light of *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007). This Court should reject petitioners' invitation because respondent satisfies *Twombly*'s pleading standard and thus a GVR will serve no purpose.

In *Twombly*, the respondents charged major telecommunications providers with an antitrust conspiracy in violation of section 1 of the Sherman Act, citing their parallel conduct as suggestive of illicit conspiracy. 127 S. Ct. at 1962-63. This Court held that respondents had failed to state a claim because independent parallel conduct – standing alone – does not compel an inference of an unlawful agreement, and Twombly's allegations to the contrary were merely conclusory. Moreover, because the complaint failed to provide petitioner with sufficient notice of any specific antitrust violations, reasonable discovery would be nearly impossible. *See id.* at 1967 (plaintiffs sued "America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years"). The Court emphasized that Fed. R. Civ. P. 8(a)(2) did not set a "probability requirement," *id.* at 1965, but instead requires that a complaint raise "enough facts to state a claim to relief that is plausible on its face," *id.* at 1974. *See also Erickson*, 127 S. Ct. at 2200 (describing the liberal pleading standards and citing *Twombly* for this proposition).

Here, respondent alleges far more than just parallel, independent conduct. His complaint makes specific factual allegations – which the Second Circuit specifically deemed "non-conclusory" – of joint conduct between the NCAA and SUNY Buffalo that provide petitioners with sufficient notice of respondent's claims. *See supra* at 1-7. Furthermore, discovery – which has thus far been denied – would be limited to specific, identifiable events occurring over a limited time frame, so that the concerns animating *Twombly* would simply not apply here.

In any event, a GVR is unnecessary as a practical matter. The Second Circuit's summary order simply remanded this case back to the district court, which when it evaluates the allegations of the complaint is bound by *Twombly* (as well as *Erickson*), as is the Second Circuit in any subsequent appeal. Remanding to the Second Circuit would add nothing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Sean O'Leary
O'LEARY & O'LEARY
320 Old Country Road
Suite 104
Garden City, NY 11530

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(*Counsel of Record*)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

October 12, 2007